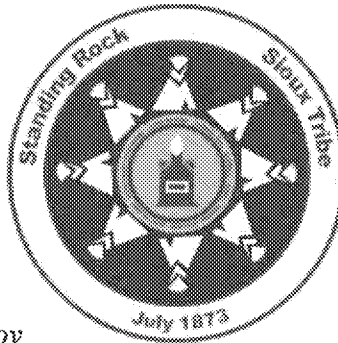


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By email to shea.valois@epa.gov

June 19, 2017

Valois Shea
U.S. Environmental Protection Agency Region 8
Mail Code 8WP-SUI
1595 Wynkoop Street
Denver, Colorado 80802-1129

RE: Testimony of the Standing Rock Sioux Tribe in Opposition to the
Dewey Burdock Class V UIC Permit Application

Dear Ms. Shea:

I write to submit written testimony of the Standing Rock Sioux Tribe in opposition to the Dewey Burdock Class V Underground Injection Control permit application, by Powertech USA, Inc. I request that this letter be included in the administrative record for the Dewey Burdock UIC permit application, and that our concerns be given full consideration by EPA.

The Standing Rock Sioux Tribe opposes the permit application for the following reasons:

- (1) The proposed Dewey Burdock project will desecrate sacred lands and waters in the Black Hills, in violation of the Treaty of Fort Laramie of April 29, 1868. (15 Stat. 635);
- (2) The Nuclear Regulatory Commission failed to conduct a good faith identification of traditional cultural properties in the project area, in violation of National Historic Preservation Act section 106 and 36 CFR §800.2(c)(2)(ii); and
- (3) The draft permit will jeopardize groundwater and surface water in the Black Hills. The administrative record lacks adequate information to demonstrate that the affected aquifer formation and surface waters will be protected from contamination.

As discussed in more detail below, for these reasons, the permit application must be denied.

1. The Draft Dewey Burdock Permit Violates the 1868 Fort Laramie Treaty

The Treaty of Fort Laramie of April 29, 1868 is denominated “Treaty with the Sioux – Brule, Oglala, Minneconjou, Yanktonai, Hunkpapa, Blackfeet, Cuthead, Two Kettle, Sans Arcs, and Santee...” (15 Stat. 635). The Standing Rock Sioux Tribe is comprised of the Yanktonai, Hunkpapa, Blackfeet and Cuthead bands of the Lakota and Dakota Nation. Accordingly, Standing Rock is a signatory to the 1868 Fort Laramie Treaty and our Tribe is entitled to the rights prescribed therein.

The 1868 Fort Laramie Treaty established the Great Sioux Reservation. The boundaries of the Reservation were described in Article 2:

The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri River where the 46th parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the 104th degree of longitude west from Greenwich, thence north on said meridian to a point where the 46th parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations of the east bank of said river, shall be and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons, except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article.

(15 Stat. 635).

The Black Hills are a significant part of our Treaty Reservation. In the negotiations for the 1868 Treaty, our forefathers emphasized the importance of the Black Hills to our Tribe and ensured that our Treaty Reservation included the Black Hills. This is sacred land. The Black Hills are integral to our creation story, and remain an important place for pilgrimage and ceremony by our Tribal members. They are the spiritual center for the Lakota and Dakota Nation. The late David Blue Thunder, a prominent Sicangu ceremonial

leader, explained that "The Black Hills are the heart of our home, and the home of our heart." (S. Hrg. 99-844, p. 234, statement of David Blue Thunder). It is akin to Jerusalem or Bethlehem, for Christianity and Judaism.

It is unlikely that EPA would suggest that uranium mining waste be permitted to be injected into disposal wells at those sacred places. EPA should not permit injection wells for uranium mining wells at the Dewey Burdock project location in the Black Hills.

Article 12 of the 1868 Treaty was supposed to ensure that our sacred lands would not be taken or despoiled without our consent:

No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians.

(15 Stat. 638).

Nevertheless, as explained by the Standing Rock Sioux Tribal leader Aljoe Agard to the U.S. Senate Committee on Indian Affairs:

Members of the committee, there are only two things that caused the government to break the 1868 treaty and deny our rights to the Black Hills. These two things were gold and greed. Once many white men learned there was gold in the Black Hills, they began to move in, driven by greed... Our efforts to protect land made the Government angry. The Government decided that we must give up our land. They tried everything – negotiations, threats, and then fierce attacks by the Army.

Nothing worked. We refused to sell our land. How could we sell it? As Crazy Horse said, "One does not sell the earth upon which the people walk." And when General Custer tried to wipe us out, we defeated him at the great battle of Little Big Horn.

The Government then decided to starve us into selling our land. They cut off all our rations and sent a commission to make an agreement with us. But the usual threats and bribes did not work. Under the 1868 treaty, no agreement was valid unless it was approved by three-fourths of the adult male Sioux. Less than 10 percent of our men approved the agreement.

Having totally failed to either fight us, bribe us, or starve us into selling our land, Congress tried to pass a law trying to take our Black Hills. But it is my firm belief, and the firm belief of the Sioux Nation,

that these illegal acts did not succeed in tearing the sacred Paha Sapa away from us.

(S. Hrg. 99-844, pp. 44-45, statement of Aljoe Agard).

The title to the Dewey Burdock project area remains disputed by the Standing Rock Sioux Tribe. In the case of *United States v. Sioux Nation of Indians*, 448 U.S. 371, 387 (1980), the United States Supreme Court ruled that the taking of Sioux Nation treaty lands under the Act of February 2, 1877 and other laws violated the 5th Amendment of the United States constitution. In affirming a judgment of \$108 million, the Court described the treatment of the Sioux Nation by the United States as “(a) more ripe and rank case of dishonorable dealings will never, in all probability, be found in our nation’s history.”

The Standing Rock Sioux Tribe and *Oceti Sakowin Oyate* have not accepted the award of money damages, and have continuously insisted that land restoration be the cornerstone of a settlement of the outstanding Treaty claims under the 1851 and 1868 Treaties. As explained by Aljoe Agard:

It has been over 100 years since the Federal Government broke faith with our people and illegally tried to take the Black Hills from us... we will continue our fight for the restoration of our sacred lands. We have not given up in 100 years and we will not give up now.

(S. Hrg. 99-844, p. 44).

The Standing Rock Sioux Tribe and *Oceti Sakowin Oyate* have rejected a monetary settlement of the issues litigated in the *United States v. Sioux Nation* case, and have insisted that land restoration be the cornerstone of any settlement. Consequently, there is a cloud on the title to the land impacted by the proposed Dewey Burdock project. There is uncertainty with respect to future land use in the area, as the *Oceti Sakowin Oyate* pursues our claim. Ultimately, the proposed Dewey Burdock UIC permit violates Article 2 of the 1868 Fort Laramie Treaty and must be denied.

The requirements of the United Nations Declaration of the Rights of Indigenous Peoples apply to the Dewey Burdock UIC permits. Article 29 paragraph 2 prohibits approval of the proposed permits without the consent of the Standing Rock Sioux Tribe:

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

(U.N. Doc. A/RES/61/295, Sept. 13, 2007).

In Article 37, paragraph 1, the U.N. Declaration requires compliance with our Treaty rights:

Indigenous peoples shall have the right to the recognition, observance and enforcement of treaties.

These requirements are incorporated into the laws of the United States, pursuant to Executive Order 13175 on *Consultation and Coordination with Indian Tribal Governments*. E.O. 13175 provides that:

The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian... treaty and other rights. **Agencies shall... honor treaty rights** and other rights.

(65 Fed. Reg. 67249).

The proposed Class V UIC permit violates the 1868 Fort Laramie Treaty, the United Nations Declaration of the Rights of Indigenous Peoples and Executive Order 13175. The EPA must deny the Dewey Burdock permit application.

2. The Nuclear Regulatory Commission Failed to Properly Identify Traditional Cultural Properties

Section 106 of the National Historic Preservation Act establishes requirements for the identification of the impacts of a federal undertaking on cultural resources. Section 106 requires that:

The head of any Federal agency... prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property.

(54 U.S.C. §306108).

The identification efforts of historic properties under section 106 must include identification of traditional cultural properties of Indian Tribes in the area of potential effects. Under section 101(d)(6) of the act, Native American traditional cultural properties are eligible for inclusion on the National Registry:

Property of traditional religious and cultural importance to an Indian Tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register (of Historic Places).

(54 U.S.C. §302706(a)).

The section 106 regulations prescribe the process for identifying historic properties and traditional cultural properties; evaluating their eligibility for the National Register;

determining whether there are adverse impacts and resolving or mitigating those impacts. (36 CFR Part 800). The statute requires consultation with Indian Tribes on the identification of the traditional cultural properties which may be impacted by a federal undertaking:

...a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to property

(54 U.S.C. §302706(a)).

The regulations explain:

Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking... **The agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional, religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects.**

36 CFR §800.2(c)(ii).

The role of Tribes is further delineated for the identification of traditional cultural properties in section 4 of the regulations:

In consultation with the SHPO/THPO, the agency official shall: (d)etermine and document the area of potential effects... (and) Gather information from any Indian tribe or Native Hawaiian organization... to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them.

36 CFR §800.4(a).

The consultation and identification efforts must be reasonable and in good faith:

... in consultation with the... THPO, and any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to properties within the area of potential effects, **the agency official shall take the steps necessary to identify historic properties within the area of potential effects. The agency official**

shall make a reasonable and good faith effort to carry out appropriate identification efforts, (to include)... consultation.

36 CFR §800.4(b).

The EPA administrative record does not demonstrate compliance with these requirements. To the contrary, the NRC, as lead agency, in cooperation with PowerTech, refused to consult in good faith with the Tribes as required by the section 106 regulations. 36 CFR §800.3(f)(2). Early discussions about Tribal participation in the identification of traditional cultural properties went nowhere. NRC and PowerTech refused to establish a meaningful area of potential effects (APE) in consultation with the Tribes. They were uncooperative and unresponsive in the limited discussions on a scope of work and funding for Tribal traditional cultural properties surveys.

As a result, the NRC failed to properly identify traditional cultural properties that are directly or indirectly impacted by the proposed Dewey Burdock UIC wells in the APE, in violation of NHPA section 101(d)(6)(B), and 36 CFR §§800.2(c)(ii) & 800.4(a) & (b).

The Standing Rock Sioux Tribe THPO documented our Tribe's fruitless efforts for the requisite section 106 consultation and Tribal role in the survey of traditional cultural properties in the sacred Black Hills. The Standing Rock Sioux Tribal Historic Preservation Office sent correspondence dated February 4, 2014 to provide comments on a draft Programmatic Agreement. None of the comments were incorporated into the Final PA, and the stated concerns with the section 106 process were totally ignored. Correspondence from our THPO dated November 5, 2012 and August 30, 2011 likewise received no response. There was no consultation on the identification of TCPs.

As stated above, the Black Hills are sacred Treaty lands of the Standing Rock Sioux Tribe under the 1868 Fort Laramie Treaty. The NRC actually attempted to rely on consultations with the Three Affiliated Tribes of Fort Berthold and Turtle Mountain Band of Chippewa Indians for the consultation on TCPs of the *Oceti Sakowin Oyate*. The consultation requirement applies to "any Indian tribe that attaches religious and cultural significance to historic properties" (36 CFR §800.2(c)(2)(ii)) or "located on ancestral, (or) aboriginal... lands." (36 CFR §800.2(c)(2)(ii)). For the Black Hills, that applies to the *Oceti Sakowin Oyate* and Northern Cheyenne Nation. The NRC cannot simply select **any** Indian Tribe willing to consult on its project. That is what occurred with Dewey Burdock.

The Final Programmatic Agreement acknowledges but mis-portrays and attempts to minimize the significance of the lack of good faith efforts in identifying TCPs. It states on page 3:

... the parties were unable to reach agreement on the scope and the cost of the Tribal survey.

That does not obviate the need for compliance with the section 106 regulations. Nevertheless, the NRC refused to engage in the good faith consultation and identification

efforts that are required. Ultimately, the NRC failed to adequately consult with the Standing Rock Sioux Tribe THPO in the identification and evaluation of Traditional Cultural Properties in the Dewey Burdock project area. Consequently, the EPA must deny the PowerTech UIC permit application.

3. The UIC Permit will Jeopardize Groundwater and Surface Water in the Black Hills

The administrative record fails to support the contention that the Dewey-Burdock injection wells will not result in the release of contaminants into the Minnelusa formation, or to surface water in the project area. Available data demonstrates that there is potential communication between the Minnelusa and Madison aquifers, and with the surface water.

The U.S. Geologic Survey has explained:

Ground and surface-water resources in the Black Hills area are highly inter-connected. The quality of the surface water can affect the quality of ground water, and vice versa... The Madison, Minnelusa, and Minnekahta aquifers are especially sensitive to contamination, because of secondary permeability and potential for streamflow recharge.

(USGS, *Atlas of Water Resources in the Black Hills Area, South Dakota*, Water Resources Investigations Atlas HA-747, 2002, pp. 59, 71).

The EPA acknowledges that there is downward flow from the Minnelusa formation into the Madison formation, but discounts the potential for migration upward. (EPA, Dewey-Burdock Class V Draft Area Permit Fact Sheet, p. 30). The Madison aquifer is the source for artesian springs in this area. Contamination of the Madison formation potentially impacts surface water through artesian springs. According to USGS,

Aquifer interactions can occur at artesian springs, which discharge about one-half of average recharge to the Madison and Minnelusa aquifers in the Black Hills area. Various investigators have hypothesized that the Madison aquifer is the primary source for many artesian springs.

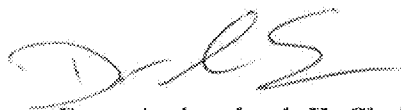
(Naus et al, *Geochemistry of the Madison and Minnelusa Aquifers in the Black Hills Area, South Dakota*, Water Resources Investigations Report 01-4129, 2001, p. 2).

The potential pathway for migration of injectate into the Madison aquifer (per EPA) and then into surface water (per USGS) is improperly discounted by EPA. The agency has failed to give proper consideration of the potential existence of pathways resulting from unidentified faults or future seismic activity. The EPA finding that "the nearest potential pathway for fluid movement out of the injection zone in the Dewey area is the Dewey

fault," is not supported by adequate data, in light of the regional seismology. (EPA, *Dewey Burdock Class V Draft Area Permit Fact Sheet*, p. 26).

Unidentified faults and abandoned test wells in the project area provide potential pathways for the migration of contaminants into adjacent aquifer formations and artesian springs, which potentially impacts surface water. For these reasons, the Dewey Burdock UIC Class V permit application must be denied.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Archambault II', with a stylized flourish at the end.

Dave Archambault II, Chairman
Standing Rock Sioux Tribe